STATE OF MICHIGAN

IN THE SUPREME COURT

POLICE OFFICERS ASSOCIATION
OF MICHIGAN,

Plaintiff/Appellee,

v

OTTAWA COUNTY SHERIFF AND
OTTAWA COUNTY BOARD OF
COMMISSIONERS,

Defendant/Appellants.
_____/

Court of Appeals No. 244919

Lower Court No. 02-42460-CZ

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PLAINTIFF/APPELLEE'S BRIEF IN OPPOSITION TO DEFENDANT/APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

COUNTER-STATEMENT REGARDING OPINION APPEALED FROM AND RELIEF SOUGHT

On January 3, 2002, a 312 arbitration panel ruled that the POAM had failed to raise, in its petition or at a pre-hearing conference, retroactivity of grievance procedures as an issue for the 312 arbitration. (Ex. 1, p. 11). Therefore, the majority of the panel ruled that the arbitration related retroactivity issues were denied on procedural grounds and would not be considered on the merits. (Ex. 1, p. 11). POAM appealed this issue before the Ottawa County Circuit Court. The Circuit Court upheld the 312 panel's decision. (Ex. 2, tr. p. 9). The POAM then filed a timely appeal with the Court of Appeals.

On or about August 19, the Court of Appeals issued its decision reversing the trial court and remanding the matter back to the arbitration panel. (Ex. 3). The court concluded that the arbitration panel erred in finding that the statute precluded the consideration at the arbitration hearing, POAM's issues regarding the retroactivity of arbitration of grievances. The court stated that nothing in the plain language of MCL 423.238 precluded a party from identifying a disputed issue at the arbitration hearing. Thus the court stated that the arbitration panel erred by failing to consider POAM's last best offer on the issue of retroactive arbitration of grievances. (Ex. 3, pp. 3-4).

The Defendant, Ottawa County, filed a Motion for Reconsideration with the Court of Appeals, as well as a Motion to Supplement the Record. On or about October 14, 2004, the Court of Appeals issued an order denying Defendants' Motion to Supplement the Record. (Ex. 4). The court granted Defendants' Motion for Reconsideration, vacated its opinion issued August 19, 2004, and issued a new opinion on reconsideration. The new opinion issued by the court on October 14, 2004 reaffirmed its original opinion that the only change be made in the footnote. The underlying theories, opinions, and rulings remained the same. (Ex. 4).

For the reasons stated in this Response in Opposition to Defendants' Application for Leave to Appeal, Plaintiff/Appellee requests that this Court deny Defendants' Application for Leave to Appeal, thus giving full force and effect to the Court of Appeals Order overturning the trial court and remanding the matter back to the arbitrator.

QUESTIONS PRESENTED FOR REVIEW

WHETHER THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE ARBITRATION PANEL ERRED WHEN IT REFUSED TO CONSIDER THE POAM'S ISSUE REGARDING RETROACTIVE ARBITRATION OF GRIEVANCES.

WHETHER THE ISSUES OF RETROACTIVITY OF GRIEVANCE ARBITRATION AND DURATION ARE MANDATORY, NOT PERMISSIVE, SUBJECTS AND ARE, THEREFORE, PROPERLY BEFORE THE ARBITRATION PANEL.

WHETHER NON-ECONOMIC ISSUES MAY BE AWARDED RETROACTIVELY TO ANY PERIOD IN DISPUTE.

WHETHER DEFENDANT'S ISSUES RAISED IN THIS APPLICATION DO NOT SATISFY THE CRITERIA NECESSARY FOR SUPREME COURT REVIEW.

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COUNTER-STATEMENT OF MATERIAL FACT AND PROCEEDING

On February 21, 2002, Plaintiff/Appellee Police Officers Association of Michigan filed a complaint to vacate, in part, a compulsory arbitration award issued on February 4, 2002. (This award is attached as Exhibit 1). Plaintiff/Appellee sought to vacate that portion of the award which denied, on procedural grounds, the Association's Last Best Offer on the right to arbitrate pending grievances and duration as it pertained to arbitration. Thereafter on March 16, 2002, Defendant/Appellant Ottawa County Sheriff Gary A. Rosema, the County of Ottawa, and the Ottawa County Board of Commissioners, filed their answer and affirmative defenses.

In the compulsory arbitration award issued by the panel on February 4, 2002, the majority of the panel concluded, "When the Association waited until the time of the hearing to raise its arbitration-related issues, it violated the rules of the Act and it would be improper to consider the Last Best Offers at this time." (Ex. 1, p. 10). The panel also concluded, "most importantly, however, the Act and the rules prohibit a consideration of the arbitration-related issues at a time near or at the scheduled arbitration hearing." (Ex. 1, p. 11). The arbitration panel cited section 8 of the Compulsory Arbitration Act, being MCLA 423.238, as well as administrative rules 423.505 and 423.507 in support of its conclusion. Subsequently, in the circuit court proceeding the parties filed cross-motions for summary disposition. The trial court issued an oral ruling on the record at the hearing which was held on September 23, 2002. The trial court upheld the award of the arbitrator panel and granted summary disposition in favor of Defendant. (Ex. 2, Tr. 9/23/02, pp. 8-10). The Plaintiff POAM filed a timely appeal contending that neither the statute nor the administrative rules foreclosed the raising of issues in dispute prior to the close of the hearing. The POAM further asserted that the decision of the arbitration panel was erroneous as a matter of law and that consequently, the arbitration panel exceeded its jurisdiction and denied the Association its statutory rights.

The Court of Appeals issued its decision on August 19, 2004. The Court of Appeals concluded that the arbitration panel erred in concluding that MCL 423.238 precluded the consideration at the arbitration hearing of POAM's issues regarding your retroactive arbitration of grievances. (Ex. 3, p. 3). Continuing on the Court of Appeals stated that nothing in the plain language of MCL 423.238 precludes a party from identifying a disputed issue at the arbitration hearing. Finally, the court stated that the arbitration panel erred by failing to consider POAM's last best offer on the issue of retroactive arbitration of grievances, and the trial court erred by granting Defendant's Motion for Summary Disposition. (Ex. 3, pp. 3-4). Furthermore, in footnote 6 the Court of Appeals stated, "Defendants raise several alternative grounds for affirming the trial court's grant of summary disposition in Defendant's favor, none of which we find persuasive." (Ex. 3, footnote 6, p. 4).

The Defendant filed a Motion for Reconsideration, as well as a Motion to Supplement the Record. Subsequently, on October 14, 2004 the Court denied Defendant's Motion to Supplement the Record, granted the Motion for Reconsideration, vacated the August 19, 2004 Opinion, and issued a new Opinion dated October 14, 2004. (Ex. 4). This new Opinion is not changed in any substantive way except to make a minor change in a footnote. The basis of the decision remains the same as the prior decision, thus the Court of Appeals reiterated their decision that the arbitration panel had erred and that the matter was reversed and remanded.

The Defendant filed the within Application for Leave to Appeal on or about the 26th day of November, 2004.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE ARBITRATION PANEL ERRED WHEN IT REFUSED TO CONSIDER THE POAM'S ISSUE REGARDING RETROACTIVE ARBITRATION OF GRIEVANCES.

The Court of Appeals overturned the Circuit Court based on the rule of statutory construction. Matters of statutory interpretation are questions of law. In re: MCI Telecommunications,, 460 Mich 396, 413, 596 NW2d 164 (1999). This court reviews questions of law under a de novo standard of review. Robertson v Daimler-Chrysler Corporation, 465 Mich 732, 641 NW2d 567 (2002), citing DiBenedetto v West Shore Hospital, 461 Mich 394, 401, 605 NW2d 300 (2000).

The Court of Appeals, in this matter, first looked at section 8 of Act 312, MCL 423.238, which provided, in relevant part:

> At *or* before the conclusion of the hearing, held pursuant to section 6, the arbitration panel shall identify the economic issues in dispute, and direct each of the parties to submit, within such time limit as the panel shall prescribe, to the arbitration panel and to each other its last best offer of settlement on each economic issue. The determination of the arbitration panel as to the issues in dispute and as to which of these issues are economic shall be conclusive. [Emphasis added].

In the Court of Appeals' decision in this matter, the Court recognized that the "primary goal of judicial interpretation of statutes is to ascertain and given effect to the intent of the legislature. Citing Gladych v New Family Homes, Inc., 468 Mich 594, 597; 664 NW2d 705 (2003). The court also stated that the "plain language" of MCL 423.238 provided that the arbitration panel shall identify the economic issues in dispute *at or before the conclusion of the hearing* held pursuant to section 6." Thus the court found that the legislature's use of the disjunctive "or" indicated that the legislature intended for arbitration panels to determine the economic issues in dispute, either *at the hearing* or *before the conclusion of the hearing*. Since there is no language in MCL 423.238 that required that issues be determined before the hearing, nor was there any language that precluded the consideration of new issues at the hearing. The arbitration panel's

conclusions did not comport with the plain language of the statute and was an error of law that was substantial and apparent on its face.

As the Union had argued, it was erroneous for the panel to have concluded that waiting until the time of the hearing to raise an issue constituted a violation of both the rules and the Act, or that the rules prohibited consideration of arbitration related issues at a time near or at the scheduled arbitration hearing. The Union further argued, and the Court of Appeals agreed, that to the extent the administrative rules are either interpreted or applied as suggested by the panel, the rules would be in conflict with the statute. To the contrary, the administrative rules are not as restrictive as asserted by the panel. In fact, nowhere within the administrative rules are 423.507(1) and (2) or section 8 of the statute is it stated that a party is foreclosed and prohibited from raising issues after the prehearing conference or any time prior to the hearing.

The Act itself in section 8 recognizes that it is only after a hearing has been initiated that issues are to be identified for purposes of setting into motion the remaining statutory requirements concerning submission of last best offers. "At ... the conclusion of the hearing," by simple logic means the hearing has already been initiated and concluded. "Before the conclusion of the hearing," does not mean before the hearing is initiated, instead, it means before the conclusion of an already initiated hearing. Fortunately, the Court of Appeals agreed that the plain language of the statute supported the conclusion that the Union would not be precluded from bringing this issue.

The Court of Appeals further addressed the proposition that statutory language should be construed reasonably, keeping in mind the purpose of the Act. Citing Draprop Corp. v Ann Arbor, 247 Mich App 410, 415; 636 NW2d 787 (2001). The court reiterated that because police and fire departments are forbidden from striking, public policy requires "alternate, expeditious, effective and binding procedure for the resolution of disputes" to maintain the high morale of the employees and the efficient operation of the

department, citing MCL 423.231. To that end, the provisions of MCL 423.231, et seq., shall be "liberally construed."

Based on the rule of statutory construction, and the mandate set forth by the Act to liberally construe Public Act 312, the court concluded that the arbitration panel had erred when they precluded the consideration of POAM's issues regarding the retroactive arbitration of grievances.

The Defendant's first argument is almost nonsensical. The Defendant argues that the courts are powerless to interfere with the 312 panel's "implied" or "assumed" decision that this is an arbitrable, economic issue, because under MCL 423.238, the panel's decision as to what issues are economic and arbitrable are conclusive. The Defendant misses the point that the Court of Appeals overturned the Circuit Court based on statutory construction issues, thus overruling the panel's statement and decision that the Plaintiff could not submit for consideration the issue regarding retroactive arbitration of grievances simply because they had not been presented in a timely manner. The Defendant continues on in this argument stating that there was a "gross error of statutory construction when the Court of Appeals gives weight to a second clause in a sentence and ignores the first." However, the Court of Appeals certainly has the power to do that and did so in this case.

Next, the Defendant argues that the Court of Appeals applied a grammatically incorrect interpretation of the first sentence of 423.238 that would conflict with several rules of statutory construction. The Defendant is incorrect in their argument as the Court of Appeals correctly read MCL 423.238 to mean exactly what it says. Applying the basic rules of judicial interpretation of statutes and looking at the plain language of MCL 423.238, the Court of Appeals correctly looked at the first phrase in section 8, recognized the legislature's use of the disjunctive or which they found indicated that the legislature intended for arbitration panels to determine the economic issues in dispute, either at the hearing or before the conclusion of the hearing. (Ex. 3, p. 3). The Court went on to say

that there is no language in MCL 423.238 that requires issues to be determined before the hearing or that precludes the consideration of new issues at the hearing. Id. The Court also noted in a footnote that the record made it clear that the parties had discussed the issue of retroactive arbitration of grievances and that the Defendants had been on notice that the issue was in dispute prior to the hearing itself. (Ex. 3, p. 3, footnote 5).

The next argument that the Defendant raises is that the Court of Appeals' decision in the instant case is contrary to the legislative intent of 423.242 and further that it violates established precedent of the Court of Appeals and the Michigan Supreme Court. Again, the Defendant is incorrect in their argument for the reason that the Court applied a de novo standard of review because the issue did involve a question of law. As stated above, statutory interpretation is a question of law and does require a de novo review. In the present matter, the Court of Appeals was well aware of the legislature's intent that there be limited review of arbitration decisions. The court stated, "While circuit courts are limited in their review of arbitration decisions pursuant to statute, MCL 423.242, we may review an error of law that is substantial and apparent on its face. Ex. 3, p. 2, citing Collins v Blue Cross Blue Shield of Michigan, 228 Mich App 560, 567; 579 NW2d 435 (1998).

II

THE ISSUES OF RETROACTIVITY OF GRIEVANCE ARBITRATION AND DURATION ARE MANDATORY, NOT PERMISSIVE, SUBJECTS AND ARE, THEREFORE, PROPERLY BEFORE THE ARBITRATION PANEL.

Ottawa County raises the unsubstantiated claim that the issues of retroactivity of grievance arbitration and duration modification are permissive subjects which cannot be pursued in compulsory arbitration. The employer, without delineating the basis for its challenge, has, from past experience, predicated this claim (at least involving the issue of retroactivity to grievance arbitration) on the Supreme Court decision in County of Ottawa v Jaklinski, 423 Mich 1, 377 NW2d 668 (1985).

Jaklinski involved discharge of an Ottawa County deputy sheriff after expiration of a collective bargaining agreement. The Supreme Court, in a 4-3 decision, determined that the right to grievance arbitration does not survive expiration of a contract, except as to accrued and vested rights, which the court indicated did not include a discharge proceeding.

Contrary to Ottawa County's contorted reliance on Jaklinski, the case does not support the proposition that retroactivity of grievance arbitration is a "permissive" subject which cannot be pursued to compulsory arbitration.

At the outset, the distinction between mandatory and permissive subjects of bargaining must be examined. Compulsory arbitration, pursuant to section 14 of the Act, being MCL 423.244, is deemed supplementary to the Public Employment Relations Act (PERA), P.A. 336 of 1947, MCL 423.201, et seq. Pursuant to PERA, a public employer and the union have the duty to bargain with respect to "wages, hours and other terms and conditions of employment." Council 25 of Local 893, AFSCME, AFL-CIO v MERC, 101 Mich 91; 300 NW2d 462 (1981). Subjects within the definition of "wages, hours and other terms and conditions of employment" are considered "mandatory" subjects of bargaining. Detroit Police Officers Association v City of Detroit, 391 Mich 44; 214 NW2d (1973). There are three types of "issues" recognized in the negotiation context: mandatory, permissive and illegal. Permissive subjects may be discussed during bargaining, but neither party has the duty to bargain over such subjects and they may not be pursued to impasse, nor pursued to compulsory arbitration. Obviously, illegal subjects cannot be discussed at all. See: Detroit Police Officers Association v City of Detroit, 391 Mich 1 (1980). A compulsory arbitration panel, pursuant to Act 312, only has jurisdiction to rule upon "mandatory" subjects of bargaining. Metropolitan Council 23 and Local 1277, AFSCME, AFL-CIO v City of Center Line, 414 Mich 642, 327 NW2d 822 (1982). In City of Center Line, the court stated:

> The distinction drawn between mandatory and permissive subjects of bargaining is significant in determining the scope of the Act 312 arbitration

> panel's authority. Given the fact that Act 312 complements PERA, and that under section 15 of PERA the duty to bargain only extends to mandatory subjects, we conclude that the arbitration panel can only compel agreement as to mandatory subjects.

City of Center Line, 327 NW2d at 827.

In Detroit Police Officers Association v City of Detroit, 391 Mich 44; 214 NW2d 830 (1974), the Supreme Court gave the following examples of mandatory subjects of collective bargaining:

> Such subjects as hourly rates of pay, overtime pay, shift differentials, holiday pay, pensions, no strike clauses, profit sharing plans, rental of company houses, grievance procedures, sick leave, work rules, seniority and promotion, compulsory retirement age, and management rights clauses are examples of mandatory subjects of bargaining.

The determination of whether a mandatory subject of bargaining exists under PERA is decided on a "case-by-case" basis. See: Bay City Education Association v Bay City Public Schools, 430 Mich 370; 422 NW2d 504 (1988), ("... the facts of each case must be carefully examined when determining the extent of the bargaining obligation"); Metropolitan Council 23 and Local 1277, AFSCME, AFL-CIO v City of Center Line, 414 Mich 642; 327 NW2d 822, 829 (1982) ("... whether or not a particular issue is a mandatory subject of bargaining ... depends heavily on the particular facts ... there is not a set guideline or standard to be used in every case ..."). A broad view must be given as to what constitutes a term or condition of employment in public sector labor relations, thereby constituting a mandatory subject of bargaining, since there is no right to strike. Central Michigan University Faculty Association v Central Michigan University, 404 Mich 268; 273 NW2d 21 (1978). In Manistee v Manistee Firefighters Association, 174 Mich App 118, 121-122, 435 NW2d 778 (1989), the court concluded that any matter with a significant impact on "wages, hours, or other conditions of employment" or "settles an aspect of the employer-employee relationship" is a mandatory subject of bargaining. See also: International Association of Firefighters v Portage, 134 Mich App 466, 473, 352 NW2d 284 (1984).

Grievance and arbitration procedures are mandatory subjects of bargaining. Pontiac Police Officers Association v Pontiac, 397 Mich 674, 681, 246 NW2d 831 (1976). There should be little dispute that duration language is, by its procedural and substantive significance to a contract's period of existence, within the confine of terms and conditions of employment and is, therefore, a mandatory subject.

Given the clarity of the law, it must be asked why the County of Ottawa would pursue a claim that grievance arbitration and duration are permissive subjects. The employer's contorted logic must, therefore, be examined. As reflected, in part, in Jt. Ex. 19, the employer reveals its misguided reliance on the Jaklinski decision. Putting aside the fact that the employer makes the outrageous and ridiculous claim that pursuant to Jaklinski, after a contract expires, all employees become "at will," the employer isolates, out of context, and without regard for the remainder of the decision, general verbiage from Jaklinski that because there is no right to post-contract grievance arbitration, grievance arbitration cannot be made retroac tive. This circuitous logic does not withstand scrutiny and, in fact, is negated by proper reading of the Jaklinski decision. In analyzing Jaklinski, we must begin with the very proposition which the court stated in its introduction to the case. The court stated:

> The narrow issue in this case is whether the right to grievance arbitration of an unjust discharge claim survives the expiration of the collective bargaining agreement by which it is created.

Jaklinski, 377 NW2d at 670. As is evident, by keeping in mind that the court was addressing a "narrow issue," negates the county's argument in the present matter that the court's decision denies a right to seek retroactive application of grievance arbitration, or declares grievance arbitration rights to be permissive, or even that employees become "at will" at the end of a contract. In fact the court in Jaklinski stated:

> No relief was available under the new collective bargaining agreement because the grievance procedure and arbitration clause of the new agreement were not given effect retroactively to January 1, 1980.

Jaklinski, 377 NW2d at 672. Certainly, this representation at least implies that if retroactivity had been given, grievance arbitration would have survived after expiration of a contract.

Jaklinski identified and reaffirmed the judicial declaration that a grievance arbitration procedure is a mandatory subject of bargaining. Jaklinski, 377 NW2d at 673, citing Pontiac Police Officers Association v Pontiac, 397 Mich 674, 681, 246 NW2d 831 (1976). The court went on to state, however:

> Under this line of reasoning, it logically follows that as part of its duty to bargain in good faith the joint employers had a duty prior to reaching impasse not to unilaterally alter the grievance arbitration mechanism in place at the time the contract expired. However, Jaklinski's grievance arose and was denied long after the parties had negotiated to impasse, at a time when the joint employers no longer had a duty not to alter the grievance arbitration mechanism.

Jaklinski, 377 NW2d at 673. It is apparent that the court concluded the county had fulfilled its obligation to bargain to impasse upon the mandatory subject such that it could take unilateral action of discontinuing grievance arbitration when the contract expired. The court did, however, not conclude that grievance arbitration is a permissive subject of bargaining. The court went on to state:

> Nothing stated here should be interpreted to mean that the parties to a collective bargaining agreement cannot explicitly agree to terms which would depart from any rule announced here. ... They may explicitly agree to extend beyond contract expiration any substantive or procedural rights. (Emphasis supplied).

Jaklinski, 377 NW2d at 678. As is evident, the court acknowledged that whatever limitation the decision presented concerning survival of arbitration rights after expiration of the contract, that the parties are at liberty to depart from the rule announced by the court, including extending beyond contract expiration substantive or procedural rights involving grievance arbitration procedures. The significance of this statement must be considered in light of the role compulsory arbitration plays in complement to PERA. Though PERA grants the right to bargain on wages, hours, terms and conditions of employment, it cannot compel parties to reach agreement. To the contrary, however,

those matters which fall within the context of wages, hours, terms and conditions of employment, being mandatory subjects of bargaining, may be compelled through the compulsory arbitration process. Given the public policy of Act 312 and its liberal construction, that which the parties can agree to by negotiation, can pursuant to compulsory arbitration, be compelled. As such, pursuant to the court's declaration in Jaklinski, any rule announced therein may be departed from by bargaining which, correspondingly, affirms that compulsory arbitration can compel the departure from the rule announced in Jaklinski, to the extent of continuing beyond contract expiration substantive or procedural rights, especially grievance arbitration. The court reiterated this possibility, stating:

> Our holding does not preclude the possibility that employers and employees may be required under a proper contract to arbitrate disputes arising out of post-contract discharges. (Fn. 14). Rather, we leave control over the question of arbitrability with the parties, from whose agreement the right to arbitration arises. Unions and employers can agree that the terms of employment during a hiatus between contracts will include the right to binding arbitration of some or all grievances. Similarly, they can agree that arbitration rights in the new collective bargaining agreement will be given effect retroactively to the date of the expiration of the old agreement. (Emphasis added).

Jaklinski, 377 NW2d at 680.

The aforesaid declaration of the court makes clear that both issues in dispute pursued by the Union in this matter are properly before the arbitration panel. The emphasized passage reflects that the hiatus period between contracts may allow for the continuation of benefits, which relates to the union's duration issue. The emphasized passage also expressly recognizes that arbitration rights may be given retroactive effect to the date of expiration of a previous agreement. Once again, that which the parties can agree to by negotiation, pursuant to Act 312, can be compelled.

One further point of interest is the court's statement in footnote 14 in Jaklinski:

> In addition, nothing here should be interpreted to preclude any claim that an employee had a right not to be discharged except for just cause under the doctrine announced in Toussaint v Blue Cross and Blue Shield, 408 Mich 579, 292 NW2d 880 (1980). ...

Jaklinski, 377 NW2d at 680. The court's statement in footnote 14 is of interest only to the extent that the County of Ottawa has historically claimed that once the contract ends, not only does grievance arbitration discontinue, but also any right to claim breach of contract in a legal proceeding in court, under the bizarre theory that employees become "at will" at the expiration of a contract. The court's statement in footnote 14 directly recognizes that notwithstanding any discontinuance of grievance arbitration rights, the parties retain the right to assert an action in court for breach of contract under the theory of wrongful discharge under Toussaint.

The Supreme Court's subsequent decision in Gibraltar School District v Gibraltar MESPA-Transportation, 443 Mich 326, 505 NW2d 214 (1993), continued the holding that grievance arbitration expires with termination of a contract, however, the court recognized methods by which grievance arbitration, applicable to the hiatus between contracts, could continue. The court stated, at footnote 9:

> This jurisdiction has similarly deemed grievance procedures and arbitration as mandatory subjects of bargaining. See: Ottawa County v Jaklinski (cite omitted); Pontiac Police Officers Association v Pontiac (cite omitted).

Gibraltar School District, 505 NW2d at 219. The court then acknowledged, in footnote 7, that the grievance arbitration right could be made retroactive, stating:

> The facts of this case suggest a third possible source of an obligation to arbitrate ... more typically, the parties might negotiate that any successor agreement might be retroactive to the date of the expiration of the prior agreement, with the intent that pending, unresolved grievances might be submitted to arbitration under the successor agreement.

Gibraltar School District, 505 NW2d at 214. The court additionally stated:

> Nor are public employees left without a means of resolving grievances. Grievances can go to the bargaining table to be resolved during negotiations, or perhaps by a retroactivity clause in the new agreement. (Emphasis supplied).

Gibraltar School District, 505 NW2d at 222. The court also addressed a concern relevant to the union's issue in this proceeding regarding modification of the duration clause, stating:

> Further, a collective bargaining agreement might be drafted so as to eliminate any hiatus between expiration of the old and execution of the new agreement, or to remain in effect until the parties bargain to impasse. (Emphasis supplied).

Gibraltar School District, 505 NW2d at 220. As is evident, the Jaklinski-Gibraltar School District line of cases do not stand for the proposition asserted by Ottawa that the issues in dispute pertaining to retroactivity of grievance arbitration or modification of the duration clause, are "permissive" subjects. To the contrary, both decisions recognize that despite grievance arbitration expiring with the end of the contract, there are mechanisms available to revive arbitration of post-expiration claims.

Notwithstanding the aforesaid, POAM is aware of one reported compulsory arbitration decision which has addressed retroactivity of grievance arbitration. In Clinton County and POAM, the compulsory arbitration chairperson, John Shepherd, later a judge of the Court of Appeals, addressed a dispute involving an employer's opposition to retroactive arbitration of grievances which arose after expiration of the contract. (See Ex. B attached hereto). Arbitrator Shepherd awarded the Union's proposal, establishing retroactive application of the grievance arbitration process, stating, in pertinent part:

> The employer argues that non-economic benefits may not be made retroactive. The Union argues that all provisions of the contract should be made retroactive and that there is legal authority to permit such an interpretation. ...
>
> ... The arbitrator adopts the Union's position.
>
> Any other position could result in the employer deliberately refusing to agree to a contract simply to permit itself to terminate an employee and deprive the employee of arbitration rights. Even if the disagreement with the union were in good faith, the innocent victim of a failure of the employer and the union to agree would be a discharged employee who had the misfortune of being discharged during a period of disagreement between the County and the Union. It seems unreasonable and unfair for this to happen and it does not seem a reasonable interpretation of the statute to allow arbitration rights to be subjected to caprice or fortuitous circumstance. It is also clear to the arbitrator that arbitration rights are a "benefit" under a contract and therefore come within the terms of the amendment to the statute.

Clinton County, p. 14 (Ex. A attached hereto).

Based on the aforesaid, contrary to the County's contention, the issues of retroactivity of grievance arbitration and duration are mandatory, not permissive subjects and are, therefore, properly before the panel.

III

NON-ECONOMIC ISSUES MAY BE AWARDED RETROACTIVELY TO ANY PERIOD IN DISPUTE.

The employer also raises a challenge that the issues are not properly before the panel because they are designated as non-economic, such that neither issue may be awarded on a retroactive basis. Based on arguments the employer has on other occasions made, the employer contends that its conclusion is supported by the decision in Metropolitan Council 23 and Local 1917, AFSCME v Board of Commissioners of Wayne County, 86 Mich App 453, 272 NW2d 681 (1979). The employer is guilty of failing to properly research the decision it relies on in comparison with legislative amendment of section 10 of the Compulsory Arbitration Act. Section 10 of P.A. 312 states, in pertinent part:

> ... The commencement of a new municipal fiscal year after the initiation of arbitration procedures under this Act, but before the arbitration decision, or its enforcement, shall not be deemed to render a dispute moot, or otherwise impair the jurisdiction or authority of the arbitration panel or its decision. Increases in rates of compensation or other benefits may be awarded retroactively to the commencement of any period(s) in dispute, any other statute or charter provision to the contrary notwithstanding ...

Section 10 of the Act was amended to read as stated herein above by P.A. 303 of 1977, effective January 3, 1978. Prior to the amendment, the statute read, in pertinent part:

> ... The commencement of a new municipal fiscal year after the initiation of arbitration procedures under this Act, but before the arbitration decision, or its enforcement, shall not be deemed to render a dispute moot, or to otherwise impair the jurisdiction or authority of the arbitration panel or its decision. Increases in rates of compensation awarded by the arbitration panel under section 10 may be effective only at the start of the fiscal year next commencing after the date of the arbitration award. If a new fiscal year has commenced since the initiation of arbitration procedures under this Act, the foregoing limitations shall be inapplicable, and such awarded

> increases may be retroactive to the commencement of such fiscal year any other statute or charter provision to the contrary notwithstanding ...

In Metropolitan Council No. 23, an action arose in 1976 (under the original statute) which challenged the authority of an arbitration panel to grant retroactivity to non-economic provisions. It is self-evident from review of the decision and the court's recitation of section 10 of the statute, that the court was dealing with a question under section 10 prior to amendment of the language which currently exists. Given the language of section 10 as it previously existed, the court, with regard to retroactivity of non-economic benefits, stated:

> The Michigan legislature clearly states that "increases (in rates of compensation) may be retroactive," but only back to the commencement of the fiscal year, i.e., December 1, 1974. The legislature specifically speaks of retroactivity but only in regard to economic benefits. The legislature was conspicuously silent on retroactivity of non-economic benefits. We hold that had the legislature intended for arbitration panels acting under the 1969 act to have the power to grant retroactivity to the subject non-economic provisions, they would have so provided. This court is constrained to hold that the intent of the Michigan legislature was not to grant such retroactivity.

Metropolitan Council No. 23, 272 NW2d at 685. As is evident, under the original section 10 language, the court concluded that only economic benefits, due to the reference to "rates of compensation" could be awarded retroactively. As is further evident, the legislature, by amendment of section 10, has specifically added the words, "or other benefits may be" to the language of the statute, thereby authorizing retroactivity to not just rates of compensation or economic benefits but also to other benefits which would encompass non-economic benefits as well. The legislative amendment also eliminated the limitation of retroactivity to the commencement of a particular fiscal year. The legislative amendment fills the gap which the court in Metropolitan Council determined existed as an impediment to retroactivity of non-economic benefits. As a result, the County of Ottawa's reliance on Metropolitan Council is seriously misplaced.

Based on the aforesaid, the non-economic issues of retroactivity of grievance arbitration and duration may be awarded retroactively "to any period in dispute" such that the issues are properly before the arbitration panel.

IV

DEFENDANT'S ISSUES RAISED IN THIS APPLICATION DO NOT SATISFY THE CRITERIA NECESSARY FOR SUPREME COURT REVIEW.

It is required that any application for leave to appeal demonstrates that the issues presented involve (1) a substantial question as to the validity of a legislative act, (2) that the issues have a significant public interest and involve political subdivisions of the state, or (3) involve legal principles of major significance to the state's jurisprudence. The Plaintiff Association asserts that the County has not met any of the three requirements such that this matter is not appropriate for Supreme Court review.

Public Act 312 is an act which provides for compulsory arbitration of labor disputes in municipal police and fire departments; to define such public departments; provides for the selection of members of arbitration panels; prescribes the procedures and authority thereof; and provides for the enforcement and review of awards thereof. Again, the Court of Appeals, when reviewing the decision of the arbitrator in this matter, was very well aware not only the limited review but the public policy surrounding Act 312. Section 423.231 states:

> It is the public policy of this state that in public police and fire departments, where the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford in an alternative, expeditious, effective and binding procedure for the resolution of disputes, and to that end the provisions of this Act, providing for compulsory arbitration, shall be liberally construed.

There are very few acts adopted by our legislature that so clearly set forth a public policy as well as the intent of the legislature in establishing an Act and how the judiciary should proceed when reviewing any matter that fall within this Act. It is very clearly stated that

the provisions of this Act shall be liberally construed. This fact was not lost on the Court of Appeals in the present matter. The Court again recognized the limited review of arbitration decisions, recognized that they may review an error of law that is substantial and apparent on its face, and even though they found that based on basic statutory interpretation laws, the plain language of the statute requires overturning the arbitration panel. The Court went on to recognize that the statutory language in this Act should be reasonably construed, keeping in mind the purpose of the Act. (Ex. 3, citing Draprop Corporation v Ann Arbor, 247 Mich App 410, 415; 636 NW2d 787, 2001). The Court continued, recognizing that police and fire departments are forbidden from striking and that public policy requires an alternate, expeditious, effective and binding procedure for the resolution of disputes in order to maintain the high morale of the employees and the efficient operation of the departments. MCL 423.231. To that end, the provisions of MCL 423.231, et seq, "shall be liberally construed."

Clearly the court below has fully considered, addressed and ruled on the issue of the public policy surrounding and encompassing Public Act 312.

Defendant further argues that this case involves statutory interpretation issues of first impression and, furthermore, an interpretation that it violates the rules of statutory construction. Again, Plaintiff's arguments are incorrect. This is not an issue of first impression in regard to statutory interpretation. The law is well settled on statutory interpretation, as well as the rules of statutory construction. Thus this cannot be a matter of substantial interest to the state's jurisprudence.

CONCLUSION

The Plaintiff/Appellee respectfully submits that the Court of Appeals' decision correctly comports with state law in the matter, as well as the public policy in this state regarding Public Act 312. For all of the above-stated reasons, the Plaintiff/Appellee requests that this Court deny Defendant's Application for Leave to Appeal.

Respectfully submitted,

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